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UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

20 CIRENA TORRES, on behalf of herself and)	Case No.: 2:14-CV-02223-MMD-PAL
all others similarly situated,)	
21)	
Plaintiff,)	NOTICE OF MOTION AND MOTION FOR
22)	FINAL APPROVAL OF CLASS ACTION
v.)	SETTLEMENT
23)	[Filed concurrently with Supplemental
KWONG YET LUNG CO., INC. (d/b/a)	Declaration of Joyce Kwan, Declaration of Kelly
24 International Marketplace), and DOES 1)	Kratz, Declaration of Chant Yedalian, Declaration
through 100, inclusive,)	of Rachel Kingrey, and [Proposed] Order and
25)	Judgment, lodged herewith]
Defendants.)	
26)	<u>HEARING</u>
	Date: February 11, 2016
27	Time: 1:00 p.m.
	Courtroom: To Be Determined
28	Judge: Hon. Miranda M. Du

1 TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD HEREIN:

2 PLEASE TAKE NOTICE THAT on February 11, 2016 at 1:00 p.m. or as soon thereafter
3 as the matter may be heard before the Honorable Miranda M. Du in a Courtroom (which is to be
4 determined by the Court), located at 333 S. Las Vegas Blvd., Las Vegas, Nevada 89101, Plaintiff,
5 Cirena Torres, on behalf of herself and on behalf of the Settlement Class, and Defendant Kwong
6 Yet Lung Co., Inc. (d/b/a International Marketplace) will and hereby do move the Court, pursuant
7 to Federal Rules of Civil Procedure Rule 23, for an Order and Judgment granting final approval of
8 the proposed class action settlement on the terms and conditions set forth in the Stipulation And
9 Settlement Agreement (hereinafter sometimes referred to as "Settlement Agreement" or
10 "Agreement"), a copy of which is attached hereto as Exhibit 1.¹

11 Plaintiff further moves the Court for an Order:

- 12 1. Confirming its previous findings that the requirements for class certification, for
13 settlement purposes, are satisfied;
- 14 2. Certifying the Settlement Class for settlement purposes;
- 15 3. Appointing Plaintiff Cirena Torres, as the Class Representative for the Settlement
16 Class;
- 17 4. Appointing attorney Chant Yedalian of Chant & Company A Professional Law
18 Corporation and attorney Kenneth M. Roberts of Dempsey, Roberts & Smith, Ltd.
19 as Class Counsel for the Settlement Class;
- 20 5. Finding that the Settlement is fair, adequate and reasonable and complies with Rule
21 23(e) of the Federal Rules of Civil Procedure;
- 22 6. Finding that the notice of Settlement directed to the Settlement Class members has
23 been completed in conformity with the Court's orders;
- 24 7. Binding all Settlement Class members who did not timely exclude themselves from
25 the settlement to the Settlement Agreement, including the releases contained in
26 paragraphs 24 and 25 of the Settlement Agreement;
- 27

28 ¹ Capitalized terms shall have the same meanings as in the Agreement, unless indicated otherwise.

- 1 8. Directing the Parties and the Claims Administrator, Dahl Administration LLC, to
- 2 effectuate all terms of the Settlement Agreement;
- 3 9. Providing that each of the Parties is to bear its own fees and costs except as
- 4 expressly provided in the Settlement Agreement or in the Court's order(s) on
- 5 Motion For Award Of Attorneys' Fees And Costs To Class Counsel And Incentive
- 6 Payment To The Class Representative; and
- 7 10. Dismissing the Action with prejudice in accordance with the terms of the
- 8 Settlement Agreement; however, the Court shall retain continuing jurisdiction: (i)
- 9 to decide the Motion For Award Of Attorneys' Fees And Costs To Class Counsel
- 10 And Incentive Payment To The Class Representative and make and enter an
- 11 order(s) wherein the Court will determine the amount of attorneys' fees and costs to
- 12 award to Class Counsel and the amount of the incentive payment to award to the
- 13 Class Representative, and (ii) to interpret, implement and enforce the settlement,
- 14 and all orders and judgment entered in connection therewith.
- 15

16 This Motion is based upon this Notice of Motion and Motion and Exhibit 1 attached hereto,
17 the Declarations and other documents filed concurrently in support thereof, the papers and
18 pleadings on file in this action, and upon such other and further evidence as the Court may adduce
19 at the time of the hearing.

20
21 DATED: January 8, 2016

CHANT & COMPANY
A Professional Law Corporation

22
23
24 By: /S/ – Chant Yedalian
25 Chant Yedalian
26 Counsel For Plaintiff and the Settlement Class
27
28

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

On October 20, 2015, this Court entered an Order granting preliminary approval of the proposed class action settlement. Dkt. #30. As part of the same Order, the Court approved a plan of notice to be directed to Settlement Class members and set deadlines by which Settlement Class members may opt-out, object or request to be heard at the final approval hearing. Dkt. #30, ¶¶ 2, 8-14.

As explained in further detail below, notice to Settlement Class members has been provided in conformity with the Court's Orders, and no Settlement Class member has opted-out, objected or requested to be heard at the final approval hearing.

Plaintiff, Cirena Torres, on behalf of herself and on behalf of the Settlement Class, and Defendant Kwong Yet Lung Co., Inc. (d/b/a International Marketplace) hereby respectfully move the Court for an Order and Judgment granting final approval of the proposed class action Settlement.

II. FACTUAL SUMMARY

Defendant International Marketplace operates an international food store located at 5000 S. Decatur Boulevard, Las Vegas, Nevada 89118. Dkt. #25: Kwan Decl. ¶¶ 2-4. The store is open to members of the public and offers for sale a wide variety of goods, including international grocery items and kitchen supplies. *Ibid.* At any given time, International Marketplace will have at least 25,000 different goods for sale and generally maintains around 30,000 different items in its sale inventory. *Ibid.*

In her declaration, Plaintiff Cirena Torres explains that she is a customer of International Marketplace. Dkt. #26: Torres Decl. ¶ 3. She also explains that on October 11, 2014, Ms. Torres made a purchase from the International Marketplace store and she paid for her purchase with her credit card. She further explains that the electronically printed customer receipt which she was provided at the point of sale had the expiration date of her credit card, the first 5 digits and last 6 digits (which is a total of 11 of 16 digits of her card number), her name as it appears on the card, and the brand of the card (e.g. Visa, etc.), all printed on her customer receipt. *Ibid.*

1 During the Settlement Class Period of December 31, 2012 to December 13, 2014
2 International Marketplace had a total of 259,696 credit card and debit card transactions. Dkt. #25:
3 Kwan Decl. ¶ 8. Of these 259,696 credit card and debit card transactions, there were
4 approximately 117,000 unique credit or debit cards used. *Ibid.* In other words, a number of
5 customers made repeat purchases. *Ibid.*

6 Plaintiff contends that each of these credit card and debit card purchases during the
7 Settlement Class Period of December 31, 2012 to December 13, 2014 resulted in an electronically
8 printed customer receipt that displays the respective credit or debit card's expiration date and more
9 than the last 5 digits of the card number on each customer's receipt. Dkt. #27: Yedalian Decl. ¶¶
10 2-5; Dkt. #28: Flanagan Decl. ¶¶ 12-15; Dkt. #25: Kwan Decl. ¶ 7.

11 On December 12, 2014, International Marketplace received a letter from Plaintiff's counsel
12 in this case entitled "Notice To Cease And Desist FACTA Violations; And Notice Of Class Action
13 Lawsuit," together with an enclosed copy of the Complaint in this case. Dkt. #25: Kwan Decl. ¶ 5.

14 On December 13, 2014, International Marketplace ensured that none of its machines were
15 printing credit and debit card expiration dates and more than the last 5 digits of the card number on
16 all electronically printed customer receipts. Dkt. #25: Kwan Decl. ¶ 7.

17 The Fair and Accurate Credit Transaction Act ("FACTA"), which is a subset of the Fair
18 Credit Reporting Act, provides that any merchant which accepts credit and/or debit cards is
19 prohibited from printing on electronically printed receipts "more than the last 5 digits of the card
20 number or the expiration date upon any receipt provided to the cardholder at the point of sale or
21 transaction." 15 U.S.C. § 1681c(g)(1). A merchant who "willfully" fails to comply with FACTA
22 is liable for (1) actual damages, if any, or statutory damages of not less than \$100 and not more
23 than \$1,000, (2) punitive damages as may be awarded by the court, and (3) attorney's fees and
24 costs. 15 U.S.C. § 1681n.

25 Plaintiff commenced this action on December 31, 2014 by filing a proposed class action
26 complaint against International Marketplace and Doe defendants. Plaintiff's Complaint alleges,
27 *inter alia*, that International Marketplace and the other defendants willfully violated FACTA by
28 printing the expiration date and more than the last 5 digits of credit and debit cards on

1 electronically printed customer receipts printed at a point of sale or transaction. International
2 Marketplace denies any wrongdoing or violation of FACTA.

3 **III. SETTLEMENT DISCUSSIONS, INCLUDING THE MEDIATION**

4 Beginning in January 2015, the Parties began to explore settlement discussions. Yedalian
5 Decl. ¶ 4. Proposals (oral and written) were made and considered as part of these discussions.
6 *Ibid.* Underlying facts and information were also exchanged between the Parties to facilitate thee
7 discussions. *Ibid.* While these discussions did not result in a settlement agreement, they did result
8 in an agreement to continue discussions among the Parties and potentially with a third-party
9 mediator in the event the Parties could not reach a resolution on their own. *Ibid.*

10 After further discussions among the Parties did not result in a settlement agreement, the
11 Parties agreed to participate in a mediation before the Honorable Philip Pro (Ret.) with the hope
12 that he could assist the Parties in resolving (or at least narrowing) their disputes and differences.
13 Yedalian Decl. ¶ 5.

14 Judge Pro was extremely proactive. Yedalian Decl. ¶ 6. He requested and received
15 briefing and other information and held a teleconference before the mediation to try to make
16 progress, or at least try to narrow or otherwise streamline issues in advance of the mediation. *Ibid.*

17 Judge Pro was just as hands-on at the mediation. Yedalian Decl. ¶ 7.

18 The Parties participated in an in-person mediation with Judge Pro in Las Vegas, Nevada on
19 May 13, 2015. Yedalian Decl. ¶ 8. Plaintiff Ms. Cirena Torres, and Class Counsel Mr. Chant
20 Yedalian each traveled to and personally attended the mediation along with local and Class
21 Counsel Mr. Kenneth Roberts. *Id.* at ¶ 9. The president of International Marketplace, Ms. Joyce
22 Kwan, and defense counsel, Mr. Jacques Chen also attended the mediation. *Id.* at ¶ 9.

23 Although the mediation was initially scheduled for a half a day and commenced in the
24 morning, because the Parties were making progress with Judge Pro, the Parties and Judge Pro
25 agreed to continue on with the mediation into the early evening. Yedalian Decl. ¶ 10.

26 During the mediation and with Judge Pro's assistance, the Parties reached agreement on a
27 class-wide settlement structure and benefits to class members. Yedalian Decl. ¶ 11. With the
28 class benefits negotiated and agreed upon, the Parties then proceeded with discussions concerning

attorneys' fees and costs and incentive awards. *Ibid.* Ultimately, all of these issues were resolved with Judge Pro's assistance. *Ibid.*

During the months that followed, counsel worked on the long-form settlement agreement, entitled Stipulation And Settlement Agreement (hereinafter sometimes referred to as "Settlement Agreement" or "Agreement") (which includes the Postal Notice, Store Notice, Full Notice, Claim Form, and proposed Preliminary Approval Order). Exh 1.² Yedalian Decl. ¶ 12.

Thus, the Settlement Agreement is a product of all of the extensive negotiations and exchanges between May 2015 and September 2015, including but not limited to the mediation and other discussions and negotiations with mediator Judge Pro. Yedalian Decl. ¶ 13. The Settlement Agreement is also based upon the information exchanged by the Parties. *Ibid.*

IV. NOTICE HAS BEEN PROVIDED TO SETTLEMENT CLASS MEMBERS IN CONFORMITY WITH THIS COURT'S ORDERS AND NOT A SINGLE CLASS MEMBER HAS OPTED-OUT, OBJECTED OR REQUESTED TO BE HEARD

Here, except for those members who have joined International Marketplace's membership plan (for which 17,303 mailing addresses are known) International Marketplace does not know, nor does it have access to postal addresses, email addresses, telephone numbers or facsimile numbers of any of its non-member customers. Dkt. #25: Kwan Decl. ¶ 9.

Thus, pursuant to the Court-approved notice plan, notice was to be provided to Settlement Class members in the following ways:

Postal Notice

Postal Notice (using a postcard) will be mailed to any Settlement Class member for whom a mailing address is known. Agreement ¶ 12(a) and Exh. A; Dkt. #25: Kwan Decl. ¶ 9.

Store Notice

Store Notice will also be posted in the International Marketplace Store at each and every cashier booth (such that each is conspicuously posted and visible to customers) for a period of one hundred eighty (180) days (180 days is the duration of the claims period). Agreement ¶ 12(b) and Exh. B. Both the Postal Notice and Store Notice shall include the Settlement Website address and

² Capitalized terms shall have the same meanings as in the Settlement Agreement.

1 toll-free telephone number which Settlement Class members may use to obtain further
2 information. Agreement ¶¶ 12(a) and (b) and Exh. A and B.

3 **Settlement Website Notice**

4 A Settlement Website shall be established and maintained by the Claims Administrator and
5 it will contain a summary description of the settlement terms and summarize options available to
6 Settlement Class members. Agreement ¶¶ 2.T. and 12(c).

7 **Full Notice and Claim Form**

8 The Settlement Website will also provide, free of charge, viewable, printable, and
9 downloadable copies of relevant documents, including the Full Notice and Claim Form. Further,
10 Settlement Class members also have the option of submitting their claim through the Settlement
11 Website, by completing and submitting an electronic version of the Claim Form on the internet
12 through the Settlement Website. Agreement ¶¶ 12(c) and 19(c).

13 **Declarations From the Parties Concerning Compliance With Notice Plan**

14 Filed concurrently with this Motion are the Supplemental Declaration Of Joyce Kwan and
15 the Declaration of Kelly Kratz which establish that notice to the Settlement Class has been
16 provided and (for the ongoing purpose of claims submission) continues to be provided in
17 conformity with the Court-approved notice plan. Supp. Kwan Decl. ¶¶ 3-6; Kratz Decl. ¶¶ 4-12.

18 **A. No Opt-Outs**

19 Settlement Class members were provided a 60-day opt-out period after the date the Store
20 Notice is first posted at the International Marketplace Store, to exclude themselves from the
21 settlement (the "Opt-Out Deadline"). Dkt. # 30, ¶ 10. Agreement ¶ 13.

22 This opt-out period expired on January 4, 2016. Kratz Decl. ¶¶ 13-14.

23 No Settlement Class member opted-out during the opt-out period. Kratz Decl. ¶ 15.

24 **B. No Objections**

25 Settlement Class members were provided a 60-day period after the date Store Notice is
26 first posted by International Marketplace, to object to the terms of the Settlement. Dkt. # 30, ¶ 11.

27 This objection period expired on January 4, 2016. Kratz Decl. ¶ 16.

1 During the objection period, no Settlement Class member objected to the Settlement.
2 Yedalian Decl. ¶ 2; Kingrey Decl. ¶ 3; Kratz Decl. ¶ 17.

3 **C. No Notice of Intention to Appear**

4 In addition to allowing Settlement Class members an opportunity to opt-out or object,
5 Settlement Class members were also provided an opportunity to request permission to appear and
6 speak at the final approval hearing. Dkt. # 30, ¶ 14.

7 Settlement Class members were provided until January 21, 2016 to make such a request
8 concerning Class Counsel's motion for an award of attorneys' fees and costs and/or the Class
9 Representative's motion for service (or incentive) award, and until January 4, 2016 concerning any
10 other matter about the settlement. Dkt. # 30, ¶ 14; Kratz Decl. ¶ 18.

11 Thus far, no Settlement Class member requested permission to appear or speak at the final
12 approval hearing. Kratz Decl. ¶ 19.

13 **V. CAFA NOTICE HAS BEEN PROVIDED TO THE APPROPRIATE**
14 **GOVERNMENT OFFICIALS AND THEY HAVE NOT OBJECTED OR**
15 **INTERVENED**

16 On October 12, 2015, pursuant to the Class Action Fairness Act, 28 U.S.C. §1715, written
17 notice of this lawsuit and settlement was provided to the appropriate government entities of all 50
18 states and the U.S. Department Justice. Kingrey Decl. ¶¶ 4-6.

19 Other than requests for copies of certain documents in this Action, no response or
20 objection has been received from the CAFA Coordinators of any of the 50 states or the U.S.
21 Department of Justice (Kingrey Decl. ¶ 6), nor have any of them intervened as is demonstrated by
22 the Court's records in this case.

23 **VI. THE LACK OF ANY OPT-OUTS, OBJECTIONS AND REQUESTS TO APPEAR**
24 **PROVIDES FURTHER SUPPORT FOR THE SETTLEMENT**

25 The lack of any opt-outs, objections and requests to appear provides further support for the
26 Settlement. "It is established that the absence of a large number of objections to a proposed class
27 action settlement raises a strong presumption that the terms of a proposed class settlement action
28 are favorable to the class members." *In re Omnivision Techs., Inc.*, 559 F.Supp.2d 1036, 1043

(N.D. Cal. 2008) (quoting *Nat'l Rural Telecomms. Coop. v. DirecTV*, 221 F.R.D. 523, 529 (C.D. Cal. 2004)). "The absence of a single objection to the Proposed Settlement provides further support for final approval of the Proposed Settlement." *Nat'l Rural Telecomm. Coop.*, 221 F.R.D. at 529.

The lack of any objection from or intervention by the CAFA Coordinators of the 50 states or U.S. Department of Justice likewise provides further support for the settlement.

VII. THE SETTLEMENT

Subject to the Court's approval pursuant to Federal Rules of Civil Procedure ("FRCP") Rule 23(e), the Parties have agreed to settle this matter upon the terms and conditions set forth in the Settlement Agreement. A summary of the terms of the Settlement Agreement is as follows:

- During the Settlement Class period of December 31, 2012 to December 13, 2014, Plaintiff contends that 259,696 electronically printed credit and debit card customer receipts were printed that display the respective card's expiration date and more than the last 5 digits of the card number on each receipt. Dkt. #27: Yedalian Decl. ¶¶ 2-5; Dkt. #28: Flanagan Decl. ¶¶ 12-15; Dkt. #25: Kwan Decl. ¶ 7.

- The Parties are not aware of any customer who has sustained any actual damages as a result of the printing of the expiration date or more than the last 5 digits of the card number on any of the subject receipts in this case.

- For the purposes of the settlement, the Parties have stipulated to the certification of the following Settlement Class: "all consumers who, at any time during the period December 31, 2012 to December 13, 2014 (the 'Settlement Class Period'), were provided an electronically printed receipt at the point of a sale or transaction at the International Marketplace Store, on which receipt was printed more than the last 5 digits of the credit card or debit card number and/or the expiration date of the consumer's credit card or debit card." Agreement ¶ 2.S.

- Each Settlement Class member, after submission of a valid and timely Claim Form, will be eligible to receive one gift card with a value of \$50.00 valid towards any purchase of a good or service at the International Marketplace Store (a "Gift Card"). Agreement ¶ 18(a).

1 • Each Settlement Class member may submit only one Claim Form regardless of the
2 number of credit or debit card transactions made by that Class Member during the Settlement
3 Class Period, and International Marketplace is only obligated to distribute one Gift Card per
4 Settlement Class member. Agreement ¶ 18(a).

5 • A valid claim will require that a Settlement Class member provide one of the
6 following items of information: (1) an original or copy of a store receipt which shows more than
7 the last 5 digits of the credit card or debit card number and/or the expiration date of the credit card
8 or debit card printed on the receipt; (2) an original or copy of a credit card or debit card statement
9 showing a transaction made at the International Marketplace store during the Settlement Class
10 Period; or (3) for those Settlement Class members who happen to a member of the International
11 Marketplace store, they may provide their member number and confirm that they made at least one
12 purchase from the store during the Settlement Class Period. Agreement at Exh. D.

13 • Each \$50.00 Gift Card (i) will be fully transferable to any and all other persons, (ii)
14 shall not expire, (iii) shall not be redeemable for cash, (iv) may only be used to make a purchase of
15 any good or service at the International Marketplace Store, and (v) is not a coupon nor does it have
16 the attributes of a coupon. Agreement ¶ 18(a).

17 • Approximately 95% of the items International Marketplace offers for sale are
18 priced less than \$50.00 and the average price of goods sold at the store is \$4.20. Dkt. #25: Kwan
19 Decl. ¶ 4.

20 • Given the nature of this particular consumer class action case, the fact that
21 International Marketplace does not know, nor does International Marketplace have access to any
22 information which would enable it to determine, the postal addresses, email addresses, telephone
23 numbers or facsimile numbers of those absent Settlement Class members who are not members of
24 the store, and experience with consumer class action claims-made rates, it is expected that
25 relatively few claims will be made and that a residue may result. Accordingly, Plaintiff
26 negotiated, and International Marketplace agreed to, a substantial *minimum* distribution as well as
27 on a plan for the disposition of any residue from that *minimum* distribution. Thus, 10,000 is the
28 minimum number of International Marketplace Gift Cards to be distributed as part of this

1 settlement. In the event that the number of valid claims is less than 10,000, the number of valid
 2 claims shall be deducted from 10,000 and the resulting amount shall be the number of Gift Cards
 3 that shall be distributed in an appropriate *cy pres* distribution. Thus, for example, if there are
 4 1,000 valid claims submitted, 1,000 Gift Cards would be distributed to those valid claimants; then,
 5 1,000 would be subtracted from the 10,000 minimum Gift Card distribution and the resulting
 6 amount, 9,000 Gift Cards, would be distributed in an appropriate *cy pres* distribution. Agreement
 7 ¶ 18(b). The *cy pres* distribution proposed by Plaintiff consists of the following charities in equal
 8 divisions: (1) Las Vegas Valley Humane Society; (2) Desert Rescue Animal Sanctuary; and (3)
 9 Tortoise Group.³ On October 15, 2015 Defendant's counsel proposed the following three
 10 charities as Defendant's proposed charities: (1) Las Vegas Rescue Mission; (2) Three Square
 11 Food Bank; and (3) Catholic Charities of Southern Nevada. Plaintiff responded by offering to a
 12 compromise solution whereby the Parties could agree on proposing all 6 charities (the 3 proposed
 13 by Plaintiff and the 3 that Defendant proposed) with any residuals equally divided among them.
 14 Defendant responded "We will separately propose the charities we believe are appropriate."

15 • As part of the settlement, International Marketplace shall implement a written
 16 FACTA compliance policy, stating that it shall comply with FACTA, 15 U.S.C. Section 1681c(g),
 17 and that it shall not print more than the last five digits of the credit or debit card number nor the
 18 credit or debit card expiration date upon any electronically printed receipt provided to any credit
 19 or debit cardholder at the point of any sale or transaction. Agreement ¶ 18(c).

21 ³ Plaintiff believes that there is a nexus between the Settlement Class and each of Plaintiff's
 22 selected charities and explains this nexus as follows: Each Settlement Class member is, by
 23 definition, a customer of International Marketplace. Thus, each Settlement Class member has an
 24 interest in food and related goods offered by International Marketplace (Kwan Decl. ¶ 6). Each of
 25 the charities proposed uses food as part of its charitable functions. For example, as part of
 26 rehabilitating and otherwise maintaining the animals they care for, the charities feed the animals
 27 which they try to preserve. Thus, if the charity decided they want to redeem Gift Cards at
 28 Defendant's store to obtain meat, produce, etc. to feed animals that they care for, that is a valid and
 valuable function. The charities also have volunteers that they try to acquire to fulfill charitable
 functions. The charities can thus provide food, etc., to these volunteers so that they can undertake
 work, whether it is in the desert, etc. The charities can also use food and food related products in
 other ways too. For example, the Las Vegas Valley Humane Society holds "Bake/Craft Sales" and
 they ask people to "provide goodies for our bake sales every other month" as one way to raise
 funds. See <http://www.lvvhumane.org/volunteer.php>. Thus, they can obtain products from
 Defendant's store for this purpose and/or sell the Gifts Cards.

1 • The Parties agreed upon and the Court approved the notice plan set forth in section
2 IV., above.

3 • Settlement Class members will have until May 2, 2016 (one hundred and eighty
4 (180) days from the date of posting the Store Notice at the International Marketplace Store) to
5 submit a Claim Form. A Claim Form may be submitted electronically through the Settlement
6 Website, by mail, or by facsimile. Agreement ¶ 19.

7 • Settlement Class members will have until January 4, 2016 (sixty (60) days after the
8 date the Store Notice is first posted at the International Marketplace Store) to exclude themselves
9 from the Settlement Class (the "Opt-Out Deadline"). Agreement ¶ 13; Dkt. #30, ¶ 10.

10 • Settlement Class members will have until January 4, 2016 (sixty (60) calendar days
11 after the date Store Notice is first posted by International Marketplace) to object to the terms of the
12 settlement. Any such objections must be filed with the Court and also served on Class Counsel
13 and counsel for International Marketplace. Agreement ¶ 14(a); Dkt. #30, ¶ 11.

14 • The Parties have agreed to Dahl Administration LLC as the designated third-party
15 who will act as settlement administrator. Agreement ¶ 2.B.

16 • International Marketplace will pay, separately and directly, all costs and expenses
17 of the Class Notice and settlement administration (including, but not limited to, the Postal Notice,
18 Store Notice, Full Notice, the Claims Administrator's fees, costs and expenses, facsimile number,
19 and toll-free call-in number). These fees, costs and expenses shall be separate from, and in
20 addition to, the Class Counsel Attorneys' fees and costs and the Class Representative's incentive
21 award. Agreement ¶ 12.

22 • Class Counsel will apply to the Court for an incentive (service) award of up to
23 \$5,000 to the named Plaintiff, to be paid separately by International Marketplace, to compensate
24 Plaintiff for her services as the Class Representative. Agreement ¶ 22.

25 • Class Counsel will apply to the Court for an award of up to \$135,000 for attorneys'
26 fees and legal costs, to be paid separately by International Marketplace, to compensate Class
27 Counsel for investigating the facts, prosecuting the lawsuit, negotiating the Settlement, causing
28

1 International Marketplace to implement a new written policy concerning FACTA, and
 2 implementing the settlement. Agreement ¶ 21.

3 • Consistent with the Agreement and this Court's Orders Class Counsel's motion for
 4 an award of attorneys' fees and costs and the Class Representative's motion for service (or
 5 incentive) awards will be posted on the Settlement Website no later than January 12, 2016 (thirty
 6 (30) days before the Fairness Hearing scheduled by the Court). Agreement ¶ 14(b); Dkt. #30, ¶
 7 12. Any objection thereto must be filed and served no later than January 21, 2016 (twenty-one
 8 (21) days before the Fairness Hearing). *Ibid.*

9 **VIII. THE SETTLEMENT CLASS**

10 For the purposes of the Settlement, the Parties have stipulated to the certification of the
 11 following Settlement Class: "all consumers who, at any time during the period December 31, 2012
 12 to December 13, 2014 (the 'Settlement Class Period'), were provided an electronically printed
 13 receipt at the point of a sale or transaction at the International Marketplace Store, on which receipt
 14 was printed more than the last 5 digits of the credit card or debit card number and/or the expiration
 15 date of the consumer's credit card or debit card." Agreement ¶ 2.S.

16 In reviewing a class action settlement, a "district court must assess whether a class exists."
 17 *Staton v. Boeing Co.*, 327 F.3d 938, 952 (9th Cir. 2003). The fundamental question "is not whether
 18 . . . plaintiffs have stated a cause of action or will prevail on the merits, but rather whether the
 19 requirements of Rule 23 are met." *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 178 (1974). This
 20 action meets these governing standards for certification under Rule 23(a) and Rule 23(b)(3).

21 International Marketplace joins this section VIII only for the purposes of effectuating the
 22 settlement set forth in the Settlement Agreement.

23 **A. Numerosity**

24 Under Rule 23(a)(1), a class action may be maintained where "the class is so numerous
 25 that joinder of all members is impracticable." "Although the absolute number of class members is
 26 not the sole determining factor, where a class is large in numbers, joinder will usually be
 27
 28

1 impracticable." *Jordan v. Los Angeles*, 669 F.2d 1311, 1319 (9th Cir. 1982).⁴

2 In *Jordan*, the Ninth Circuit determined that the proposed class sizes in that suit of 39, 64,
3 and 71 were large enough such that the other factors need not be considered. *Ibid.* "The fact that
4 the size of the proposed class has not been exactly determined is not a fatal defect in the motion; a
5 class action may proceed upon estimates as to the size of the proposed class." *In re Alcoholic*
6 *Beverages Litig.*, 95 F.R.D. 321, 324 (D.C. N.Y. 1982); *In re Computer Memories Sec. Litig.*, 111
7 F.R.D. 675, 679 (N.D. Cal. 1986) (class certified where plaintiffs did not establish exact number
8 of class members, but demonstrated that class would "obviously be sufficiently numerous").

9 Here, the 259,696 credit card and debit card receipts (for which approximately 117,000
10 unique credit or debit cards were used) demonstrates that the sheer number of class members
11 easily surpasses the class sizes in *Jordan* which the Ninth Circuit deemed satisfied the numerosity
12 requirement. Dkt. #25: Kwan Decl. ¶¶ 7-8; Dkt. #27: Yedalian Decl. ¶¶ 2-5; Dkt. #28: Flanagan
13 Decl. ¶¶ 12-15.

14 The fact that, by the very nature of the Settlement Class, many of its members are
15 unknown and cannot be readily identified, further dictates that joinder is impracticable. *Jordan*,
16 669 F.2d at 1319-1320; Dkt. #25: Kwan Decl. ¶ 9.

17 **B. Commonality**

18 Rule 23(a)(2) requires that there be "questions of law or fact common to the class." This
19 commonality requirement must be "construed permissively." *Hanlon v. Chrysler Corp.*, 150 F.3d
20 1011, 1019 (9th Cir. 1998). "All questions of fact and law need not be common to satisfy the rule.
21 The existence of shared legal issues with divergent factual predicates is sufficient, as is a common
22 core of salient facts coupled with disparate legal remedies within the class." *Ibid.* Where a class is
23 united by a common interest in determining whether a defendant's broad course of conduct is
24 actionable, commonality is not defeated "by slight differences in class members' positions."
25 *Blackie v. Barrack*, 524 F.2d 891, 902 (9th Cir. 1975).

26 ⁴ "Where the class is not so numerous, however, the number of class members does not weigh as
27 heavily in determining whether joinder would be infeasible. In the latter situation, other factors
28 such as the geographical diversity of class members, the ability of individual claimants to institute
separate suits, and whether injunctive or declaratory relief is sought, should be considered in
determining impracticability of joinder." *Jordan, supra*, 669 F.2d at 1319.

"This analysis does not turn on the number of common questions, but on their relevance to the factual and legal issues at the core of the purported class' claims. Compare *Dukes*, 131 S.Ct. at 2556 ('**We quite agree that for purposes of Rule 23(a)(2), even a single common question will do.**') (internal quotation marks omitted), *Wang v. Chinese Daily News*, 737 F.3d 538, 544 (9th Cir. 2013) ('Plaintiffs need not show that every question in the case, or even a preponderance of questions, is capable of classwide resolution.'), *Mazza*, 666 F.3d at 589 ('[C]ommonality only requires a single significant question of law or fact.'), with *Dukes*, 131 S.Ct. at 2551 ('What matters to class certification is not the raising of common `questions'—even in droves.')" *Jimenez v. Allstate Ins. Co.*, 765 F.3d 1161, 1165 (9th Cir. 2014).

Commonality cannot be disputed here. All class members share two common legal questions – whether International Marketplace violated FACTA by printing the expiration date and more than the last 5 digits of debit and credit cards on receipts, and whether its practice of doing so was "willful." None of the relevant questions relates to the conduct of the class members, but rather all focus on International Marketplace's conduct and culpability in violating FACTA. See, e.g., *Tchoboian v. Parking Concepts, Inc.*, 2009 WL 2169883 *5 (C.D. Cal. 2009), petition for permission to appeal grant of certification denied October 20, 2009, 9th Cir. Docket No. 09-80132 ("The overriding legal issue is whether [defendant]'s alleged noncompliance was willful so that the class members are entitled to statutory damages. Moreover, whether [defendant] violated FACTA is a combined question of law and fact common to all members."); *Medrano v. WCG Holdings, Inc.*, 2007 WL 4592113 *2 (C.D. Cal. 2007) ("There is a common core of salient facts across the class. Each member of the proposed class received a non-compliant receipt from [Defendant] after the applicable compliance deadline."); *Kesler v. Ikea U.S., Inc., et al.*, 2008 WL 413268 *3 (C.D. Cal. 2008) ("In this case, the facts and legal issues of each class member's claim are nearly, if not entirely, identical. There is a common core of salient facts across the class. Each member of the proposed class received a non-compliant receipt from IKEA after the December 4, 2006 FACTA compliance deadline. The overriding legal issue is whether IKEA's noncompliance was willful, so that the class members are entitled to statutory damages.")

1 **C. Typicality**

2 Rule 23(a)(3) requires that the representative plaintiff have claims "typical of the claims ...
3 of the class." "[R]epresentative claims are 'typical' if they are reasonably co-extensive with those
4 of absent class members; they need not be substantially identical." *Hanlon*, 150 F.3d at 1020.
5 Named plaintiffs need not be "identically situated" with all other class members; rather, "[i]t is
6 enough if their situations share a 'common issue of law or fact' [citation] and are 'sufficiently
7 parallel to insure a vigorous and full presentation of all claims for relief.'" *Cal. Rural Legal*
8 *Assistance, Inc. v. Legal Services. Corp.*, 917 F.2d 1171, 1175 (9th Cir. 1990). Moreover,
9 typicality refers to the "nature of the claim ... of the class representative, and not to the specific
10 facts from which it arose or the relief sought." *Hanon v. Dataproducts Corp.*, 976 F.2d 497, 508
11 (9th Cir. 1992). The test of typicality is thus "whether other members have the same or similar
12 injury, whether the action is based on conduct which is not unique to the named plaintiffs, and
13 whether other class members have been injured by the same course of conduct." *Ibid*.

14 Here, Plaintiff and all other class members allege the same injury, violation of their
15 FACTA rights resulting from the same course of conduct — the printing of their card expiration
16 date and more than the last 5 digit of their card number on credit or debit card receipts.
17 Accordingly, this lawsuit is based on conduct which is not unique to Plaintiff, but on standardized,
18 uniform conduct that is common to all class members. Moreover, the same relief, specifically,
19 statutory damages under 15 U.S.C. § 1681n, is sought for all class members for International
20 Marketplace's "willful" violation of FACTA. Accordingly, the typicality requirement is satisfied.
21 *Tchoboian*, 2009 WL 2169883 *5 (C.D. Cal. 2009) (holding that typicality is satisfied because
22 "[Plaintiff]'s claim is, in fact, 'substantially identical' to the claims of the proposed class members-
23 namely, he alleges that [defendant] issued him a noncompliant receipt in willful violation of the
24 FACTA"); *Medrano*, 2007 WL 4592113 *3 (same); *Kesler*, 2008 WL 413268 *4 (same); *Murray*
25 *v. GMAC Mortgage Corp.*, 2007 WL 1100608 *5 (N.D. Ill. 2007) ("*Murray II*") (typicality
26 satisfied where, despite minor factual discrepancies, all putative class members had "the same
27 essential characteristics"); *In re Activision Securities Litigation*, 621 F.Supp. 415, 428 (N.D. Cal.
28 1985) (finding that "the only material variation among class members is the amount of damages to

1 which each member is entitled" and that "[s]uch differences are insufficient to defeat class
2 certification.")

3 **D. Adequate Representation**

4 Rule 23(a)(4) requires that "the representative parties will fairly and adequately protect the
5 interests of the class." Representation is adequate if (1) class counsel is qualified and competent
6 and (2) the class representative and his or her counsel are not disqualified by conflicts of interest.
7 *Lerwill v. Inflight Motion Pictures, Inc.*, 582 F.2d 507, 512 (9th Cir. 1978).

8 Here, there are no conflicts of interest between Plaintiff and Settlement Class members.
9 Plaintiff and each class member assert identical claims for statutory damages arising from the
10 same facts, *i.e.*, International Marketplace's printing of the expiration date and more than the last 5
11 digits of the respective credit or debit card on receipts. Thus, there is no potential for conflicting
12 interests in this action. *Abels v. JBC Legal Group, P.C.*, 227 F.R.D. 541, 545 (N.D. Cal. 2005) (no
13 conflict where claims asserted by plaintiff and class members arise from defendants' use of form
14 letters allegedly violating the Fair Debt Collection Practices Act). Moreover, there is no basis for
15 asserting against Plaintiff any unique defenses that International Marketplace could not assert
16 against any other Settlement Class member. Nor is there any basis to suggest that Plaintiff lacks
17 sufficient zeal or competence.

18 Nor are there any conflicts with Plaintiff's counsel. Plaintiff is represented by highly
19 capable and competent counsel experienced in class action litigation, including FACTA lawsuits.
20 Yedalian Decl. ¶¶ 35-49. *Local Joint Exec. Bd. of Culinary/Bartender Trust Fund v. Las Vegas*
21 *Sands, Inc.*, 244 F.3d 1152, 1162 (9th Cir. 2001) (adequacy established by mere fact that counsel
22 were experienced practitioners).

23 **E. Rule 23(b)(3) Requirements Are Met**

24 The Parties seek certification pursuant to Rule 23(b)(3), which authorizes certification if
25 "the court finds that the questions of law or fact common to class members predominate over any
26 questions affecting only individual members, and that a class action is superior to other available
27 methods for fairly and efficiently adjudicating the controversy." FRCP 23(b)(3). Rule 23(b)(3)'s
28 predominance and superiority factors are satisfied.

1 1. **Predominance of Common Questions**

2 To satisfy predominance, common questions of law or fact must "present a significant
3 aspect of the case" and be capable of resolution "in a single adjudication." *Hanlon*, 150 F.3d at
4 1022-1023; *Culinary/Bartender Trust Fund*, 244 F.3d at 1163.

5 The predominance inquiry focuses on whether the class is "sufficiently cohesive to warrant
6 adjudication by representation." *Culinary/Bartender Trust Fund*, 244 F.3d at 1162. Central to this
7 question "is the notion that the adjudication of common issues will help achieve judicial
8 economy." *Zinser v. Accufix Research Institute, Inc.*, 253 F.3d 1188, 1189 (9th Cir. 2001).

9 In this case, whether International Marketplace violated FACTA "willfully" is the central
10 issue that clearly predominates over any individual issues. Whether International Marketplace did
11 so depends upon facts concerning its own conduct — conduct that applies uniformly to all class
12 members in this case.

13 That common issues predominate is also bolstered by the fact that the available remedy in
14 this case is statutory damages. As the Ninth Circuit explained in *Bateman v. American Multi-*
15 *Cinema, Inc.*, 623 F.3d 708, 719 (9th Cir. 2010), "irrespective of whether Bateman and all the
16 potential class members can demonstrate actual harm resulting from a willful violation, they are
17 entitled to statutory damages."

18 That common issues predominate is also evidenced by the fact that all class members'
19 claims involve the very same conduct by International Marketplace —the printing of receipts
20 which contain the credit or debit card's expiration date and more than the last 5 digits.

21 "When common questions present a significant aspect of the case and they can be resolved
22 for all members of the class in a single adjudication, there is clear justification for handling the
23 dispute on a representative rather than on an individual basis." *Hanlon*, 150 F.3d at 1022 (internal
24 quotation marks omitted).

25 2. **Superiority**

26 To determine whether the superiority requirements of Rule 23(b)(3) are satisfied, a court
27 must compare a class action with alternative methods for adjudicating the parties' claims. Lack of a
28 viable alternative to a class action necessarily means that a class action satisfies the superiority

1 requirement. "[I]f a comparable evaluation of other procedures reveals no other realistic
 2 possibilities, [the] superiority portion of Rule 23(b)(3) has been satisfied." *Culinary/Bartender*
 3 *Trust Fund*, 244 F.3d at 1163; *Valentino v. Carter-Wallace*, 97 F.3d 1227, 1235-36 (9th Cir. 1996)
 4 ("a class action is a superior method for managing litigation if no realistic alternative exists").

5 In *Local Joint Executive Board of Culinary/Bartender Trust Fund*, the Ninth Circuit held
 6 that a class action met the superiority requirements of Rule 23(b)(3) where class members could
 7 recover, at most, damages in the amount of \$1,330. Here, class members can recover, at most,
 8 statutory damages in an amount between \$100 and \$1,000 per violation. As in
 9 *Culinary/Bartender Trust Fund*, "This case involves multiple claims for relatively small individual
 10 sums.... If plaintiffs cannot proceed as a class, some-perhaps most — will be unable to proceed as
 11 individuals because of the disparity between their litigation costs and what they hope to recover.
 12 'Class actions ... may permit the plaintiffs to pool claims which would be uneconomical to litigate
 13 individually.'" *Id.* at 1163; see also *Hanlon*, 150 F.3d at 1023 (explaining that "In this sense, the
 14 proposed class action is paradigmatic"); *Yokoyama v. Midland Nat'l*, 594 F.3d 1087, 1094 (9th Cir.
 15 2010); (\$10,000-\$15,000 not sufficient incentive to sue individually); *Chalk v. T-Mobile USA,*
 16 *Inc.*, 560 F.3d 1087, 1095 (9th Cir. 2009) ("policy at the very core of the class action mechanism
 17 is to overcome the problem that small recoveries do not provide the incentive for any individual to
 18 bring a solo action prosecuting his or her rights"). In *Murray v. GMAC Mortgage Corp.*, 434 F.3d
 19 948, 953 (7th Cir. 2006), a case involving the *identical* remedy provisions of the FCRA⁵, the
 20 Seventh Circuit held as follows: "Rule 23(b)(3) was designed for situations such as this, in which
 21 the potential recovery is too slight to support individual suits, but injury is substantial in the
 22 aggregate."

23 The Supreme Court has similarly held. *Phillips Petroleum Co., v. Shutts*, 472 U.S. 797,
 24 809 (1985) ("this lawsuit involves claims averaging about \$100 per plaintiff; most of the plaintiffs
 25 would have no realistic day in court if a class action were not available"); *Deposit Guar. Nat'l*
 26 *Bank v. Roper*, 445 U.S. 326, 338 n.9 (1980) ("damages claimed by the two named plaintiffs
 27

28 ⁵ "FACTA and other provisions of the FCRA [the Fair Credit Reporting Act] share the same
 statutory damages provision, see 15 U.S.C. § 1681n." *Bateman, supra*, 623 F.3d at 715.

1 totaled \$1,006.00. Such plaintiffs would be unlikely to obtain legal redress.... This, of course, is a
2 central concept of Rule 23"); *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 161 (1974) ("No
3 competent attorney would undertake this complex antitrust action to recover so inconsequential an
4 amount. Economic reality dictates that petitioner's suit [involving individual damage of \$70]
5 proceed as a class action or not at all").

6 In sum, as the Ninth Circuit explained in another FACTA case, the purpose of Rule
7 23(b)(3) is "to allow integration of numerous small individual claims into a single powerful unit."
8 *Bateman*, 623 F.3d at 722.

9 The above authorities clearly dictate that the superiority requirements of Rule 23(b)(3) are
10 satisfied here.

11 Consideration of the factors listed in Rule 23(b)(3) bolsters this conclusion. Ordinarily,
12 these factors are (A) the interest of class members in individually controlling the prosecution of
13 separate actions; (B) the extent and nature of any litigation concerning the controversy already
14 commenced by other class members; (C) the desirability or undesirability of concentrating the
15 litigation of the claims in the particular forum; and (D) the difficulties likely to be encountered in
16 the management of a class action. However, when a court reviews a class action settlement, the
17 fourth factor does not apply. In deciding whether to certify a settlement class action, a district
18 court "need not inquire whether the case, if tried, would present intractable management
19 problems." *Amchem Products Inc. v. Woodward*, 521 U.S. 591, 620 (1997). The remaining
20 factors set forth in Rule 23(b)(3)(A), (B) and (C) all favor class certification in this case.

21 First, class members have no particular interest in individually controlling the prosecution
22 of separate actions. Statutory damages cannot exceed \$1,000, and the fact of the matter is that
23 there is no other known separate action filed or prosecuted by any other class members.
24 Moreover, any Settlement Class member who desires to pursue actual damages could opt out of
25 the Settlement.

26 Second, and as explained above, the Parties are not aware of any other litigation regarding
27 the FACTA violations at issue in this case.

28 Third, it is desirable to concentrate the litigation in this forum because International

1 Marketplace resides in Nevada and the alleged FACTA violations involve the International
2 Marketplace store in Nevada and within this district where the receipts were issued. Moreover,
3 Plaintiff and International Marketplace have reached a Settlement. "With the settlement in hand,
4 the desirability of concentrating the litigation in one forum is obvious." *Elkins v. Equitable Life*
5 *Ins. of Iowa*, 1998 WL 133747 *19 (M.D. Fla. 1998); *Strube v. American Equity Life Ins. Co.*, 226
6 F.R.D. 688, 697 (M.D. Fla. 2005) (third and fourth Rule 23(b)(3) factors are "conceptually
7 irrelevant in the context of a settlement").

8 The conclusion is inescapable that there simply is no better method than a class action for
9 resolving all the claims of the Settlement Class Members in this case. The conclusion of the court
10 in *Murray II*, where the court certified a case involving claims for statutory damages under the
11 FCRA, applies equally here:

12 "This is a case where class certification presents the most efficient means of
13 adjudicating the controversy. The class is numerous but the potential recovery for
14 each class member is quite small. Indeed, it is exceedingly unlikely that many
15 individuals would wish to go to court for a potential recovery of \$100-or that they
16 could find counsel willing to represent them." *Murray II*, 2007 WL 1100608 *7.

17 Finally, FACTA is a consumer protection statute which serves not just to compensate, but
18 also to "deter" future violations. *Bateman*, 623 F.3d at 718. As the Ninth Circuit has also
19 explained, this "deterrent purpose" of FACTA is served by certification: "we are quite sure that
20 certification of a class here would preserve, if not amplify, the deterrent effect of FACTA." *Id.* at
21 723.

22 **IX. THE TWO-STEP APPROVAL PROCESS**

23 There is a "strong judicial policy that favors settlements," particularly in class actions and
24 other complex cases where substantial resources can be conserved by avoiding the time, cost, and
25 rigors of continued litigation. *Class Plaintiffs v. City of Seattle*, 955 F.2d 1268, 1276 (9th Cir.
26 1992); *In re Pacific Enters. Sec. Litig.*, 47 F.3d 373, 378 (9th Cir. 1995).

27 A settlement of class litigation must be reviewed and approved by the Court. FRCP Rule
28 23(e). This is done in two steps: (1) an early (preliminary) review by the trial court, and (2) a final

1 review after notice has been distributed to the class members for their comment or objections.

2 This Court has already performed the first step, having granting preliminary approval of
3 the proposed settlement on October 20, 2015 (Dkt. #30), and this Motion concerns the second
4 step.

5 At the second step of the approval process (usually referred to as the fairness hearing or
6 final approval hearing), after class members have been notified of the proposed settlement and
7 have had an opportunity to be heard, the court makes a final determination whether the settlement
8 is "fair, reasonable and adequate" under Rule 23(e). *Armstrong v. Board of School Directors of*
9 *the City of Milwaukee*, 616 F.2d 305, 314 (7th Cir. 1980).

10 **X. THE PRESUMPTION OF FAIRNESS**

11 Courts presume the absence of fraud or collusion in the negotiation of a settlement unless
12 evidence to the contrary is offered. In short, there is a presumption that the negotiations were
13 conducted in good faith. *Newberg*, § 11:51, *In re Chicken Anti-Trust Litigation*, 560 F.Supp 957,
14 962 (N.D. Ga. 1980); *Priddy v. Edelman*, 883 F.2d 438, 447 (6th Cir. 1989); *Mars Steel Corp. v.*
15 *Continental Illinois National Bank and Trust Co.*, 834 F.2d 677, 682 (7th Cir. 1987). Courts do
16 not substitute their judgment for that of the proponents, particularly where, as here, settlement has
17 been reached with the participation of experienced counsel familiar with the litigation. *Hammon*
18 *v. Barry*, 752 F.Supp 1087, 1093 (D. D.C. 1990); *Steinberg v. Carey*, 470 F.Supp. 471, 474 (S.D.
19 N.Y. 1979); *Sommers v. Abraham Lincoln Federal Savings & Loan Assoc.*, 79 F.R.D. 571, 573-
20 574 (E.D. Pa. 1978); *In re Pacific Enters. Sec. Litig.*, 47 F.3d 373, 378 (9th Cir. 1995).

21 While the recommendations of counsel proposing the settlement are not conclusive, the
22 Court should take them into account and afford them "great weight," particularly where, as here,
23 they are capable and competent, have experience with this type of matter, and have been
24 intimately involved in this litigation. *Nat'l Rural Telecomm. Coop. v. DirecTV*, 221 F.R.D. 523,
25 528 (C.D. Cal. 2004) ("Great weight" is accorded to the recommendation of counsel, who are
26 most closely acquainted with the facts of the underlying litigation. [citation.] This is because
27 '[p]arties represented by competent counsel are better positioned than courts to produce a
28 settlement that fairly reflects each party's expected outcome in the litigation.'"); *See also*

1 *Newberg*, § 11:47.

2 As further explained below, this presumption of fairness is further bolstered by the fact
3 that the Settlement was reached through the extensive negotiations that occurred with the
4 assistance of a mediator, Judge Pro (Ret.). *Satchell v. Fed. Express Corp.*, 2007 WL 1114010 *4
5 (N.D. Cal. 2007).

6 **XI. THIS SETTLEMENT IS FAIR AND REASONABLE**

7 The Settlement is well within the range of reasonableness and final approval should be
8 granted. No single criterion determines whether a class action settlement meets the requirements
9 of Rule 23(e). In connection with final approval determinations, the Ninth Circuit has directed
10 district courts to consider a variety of factors without providing an "exhaustive list" or suggesting
11 which factors are most important. *Staton, supra*, 327 F.3d at 959. "The relative degree of
12 importance to be attached to any particular factor will depend upon and be dictated by the nature
13 of the claim(s) advanced, the type(s) of relief sought, and the unique facts and circumstances
14 presented by each individual case." *Officers for Justice v. Civil Service Commission of City and*
15 *County of San Francisco*, 688 F.2d 615, 625 (9th Cir. 1982). Indeed, "one factor alone may prove
16 determinative in finding sufficient grounds for court approval." *Nat'l Rural Telecomm. Coop. v.*
17 *DirecTV*, 221 F.R.D. 523, 525 (C.D. Cal. 2004); *Torrise v. Tucson Elec. Power Co.*, 8 F.3d 1370,
18 1376 (9th Cir. 1993), *cert. denied*, 512 U.S. 1220 (1994).

19 Due to the impossibility of predicting any litigation result with certainty, a district court's
20 evaluation of a settlement essentially amounts to "nothing more than 'an amalgam of delicate
21 balancing, gross approximations and rough justice.'" *Officers for Justice*, 688 F.2d at 625. The
22 ultimate touchstone, however, is whether "class counsel adequately pursued the interests of the
23 class as a whole." *Staton*, 327 F.3d at 961. As the Ninth Circuit explained in *Officers for Justice*,
24 the district court's role in evaluating a class action settlement is therefore tailored to meet that
25 narrow objective. Review under Rule 23(e) "must be limited to the extent necessary to reach a
26 reasoned judgment that the agreement is not the product of fraud or overreaching by, or collusion
27 between, the negotiating parties." *Officers for Justice*, 688 F.2d at 625. Accordingly, the Ninth
28 Circuit will not reverse a district court's approval of a class action settlement unless the settlement

provisions clearly suggest the possibility that class interests gave way to self interest. *Staton*, 327 F.3d at 961. Some of the factors which were considered in evaluating the reasonableness of this Settlement are as follows:

A. Risks of Continuing Litigation

Absent this Settlement, there are very real risks involved in continued litigation, including extensive delays, potential appeals and the possibility that Settlement Class members may ultimately end up with no recovery. Yedalian Decl. ¶ 14.

1. "Willfulness"

In order to recover any statutory damages and other remedies under 15 U.S.C. § 1681n, Plaintiff must show that International Marketplace engaged in "willful" conduct. However, International Marketplace has vigorously denied that its conduct was willful. Yedalian Decl. ¶ 16. In contrast, Plaintiff believes, among other things, that the printing of the expiration date and more than the last 5 digits of the card number was reckless and obvious to International Marketplace and the result of a lack of adequate measures to safeguard consumer rights. *Ibid.*

Regardless of how strongly the Parties feel about the merits, the Parties face issues and risks concerning how the legal requirements for a "willful" violation of FACTA will be applied to the particular facts of this case. Yedalian Decl. ¶ 17.

2. Class Certification

The Parties have sharply divergent positions on class certification in this case, absent a settlement. International Marketplace has denied that for any purpose other than that of settling this lawsuit, this action is appropriate for class treatment. Agreement ¶ 4; Yedalian Decl. ¶ 18.

Plaintiff believes that the Ninth Circuit's decision in *Bateman v. American Multi-Cinema, Inc.*, 623 F.3d 708 (9th Cir. 2010), which reversed the denial of class certification in another FACTA case, strongly supports certification in this case. Yedalian Decl. ¶ 19.

Yet, absent a settlement, class certification remains a hotly contested matter in this case, and there are risks attendant in continued litigation of these issues, including, at a minimum, delays and potential appeals. Yedalian Decl. ¶ 20.

For example, after the Ninth Circuit's decision in *Bateman*, one district court within the Central District denied class certification in a FACTA case, *Martin v. Pacific Parking Systems, Inc.*, 2012 WL 2552694 (C.D. Cal. July 2, 2012). On September 6, 2012, the Ninth Circuit granted a Rule 23(f) petition for permission for discretionary leave to appeal the district court's denial of certification in *Martin* (9th Cir. Docket No. 12-80144), and on appeal it was held that the district court did not abuse its discretion based upon the facts in that case. 2014 WL 3686135 (July 25, 2014). Yedalian Decl. ¶ 21.

In sum, while Plaintiff feels strongly about certification in this case, *Martin* is an example of a FACTA case demonstrating the risks inherent in certification, including, at a minimum, delays and potential appeals. Yedalian Decl. ¶ 22.

B. Substantial Benefits of Settlement Compared to Risks of Continued Litigation

The Settlement provides for substantial benefits.

The settlement provides that each Settlement Class member who submits a valid and timely claim will be entitled to receive one Gift Card in the amount of \$50. Agreement ¶ 18(a). Further, the Settlement provides for a guaranteed *minimum* of 10,000 Gift Cards to be distributed and establishes a *cy pres* mechanism to ensure distribution. Agreement ¶ 18(b). Additionally, International Marketplace will pay, separately and directly, all costs and expenses of the Class Notice and settlement administration (including, but not limited to, the Postal Notice, Store Notice, Full Notice, the Claims Administrator's fees, costs and expenses, facsimile number, and toll-free call-in number). Agreement ¶ 12. The Parties have agreed to Dahl Administration LLC as the designated third-party who will act as settlement administrator ("Claims Administrator"). Agreement ¶ 2.B. Based upon the administration of 17,303 known postal mailing addresses alone, the Claims Administrator provided a quote of \$ 21,851 to defense counsel.

Further, the value of the International Marketplace Gift Card is considerable in that it is 50% of the minimum statutory damages (\$100) available for a willful violation of FACTA. Although compared to the maximum possible recovery of \$1,000 in statutory damages, \$50.00 is a 5% value (which is not insubstantial), the propriety of awarding *full* statutory damages to Settlement Class members who do not claim actual monetary loss is strongly disputed. Many

1 FACTA defendants have argued that lack of "actual harm" precludes, if not any award of statutory
2 damages to begin with, at the very least "excessive" statutory damages. Since it remains to be
3 seen how courts will resolve such constitutional challenges to statutory damage awards under
4 FACTA, the value negotiated by the Parties represents a fair compromise well within the range of
5 reasonableness. Yedalian Decl. ¶ 25.

6 "The proposed settlement is not to be judged against a hypothetical or speculative measure
7 of what *might* have been achieved by the negotiators." *Officers for Justice, supra*, 688 F.2d at
8 625. Moreover, as long as the Settlement is reasonable, it does not matter that under the best case
9 scenario, the potential value of the case may be much higher. *In re Cendant Corp., Derivative*
10 *Action Litigation*, 232 F.Supp.2d 327, 336 (D. N.J. 2002) (approving settlement which provided
11 less than 2% value compared to maximum possible recovery); *In re Heritage Bond Litigation*,
12 2005 WL 1594403 *27-28 (C.D. Cal. 2005) (median amounts recovered in settlement of
13 shareholder class actions were between 2% - 3% of possible damages).

14 The \$50 Gift Card is also reasonable when compared to the value of similar benefits in
15 other FACTA cases. For example, in *In re Toys "R" Us—Delaware, Inc.—Fair And Accurate*
16 *Credit Transactions Act (FACTA) Litigation*, No. cv-08-01980 MMM (FMOx), 295 F.R.D. 438,
17 447 (C.D. Cal. January 17, 2014), the Court found that the benefit of vouchers having a maximum
18 combined value of \$30.00 was reasonable in a case alleging nationwide FACTA violations against
19 a much larger corporate defendant.

20 Another benefit of this lawsuit and settlement is the fact that, as part of the settlement,
21 International Marketplace shall implement a written FACTA compliance policy, stating that it
22 shall comply with FACTA, 15 U.S.C. Section 1681c(g), and that it shall not print more than the
23 last five digits of the credit or debit card number nor the credit or debit card expiration date upon
24 any electronically printed receipt provided to any credit or debit cardholder at the point of any sale
25 or transaction. Agreement ¶ 18(c). This FACTA compliance policy ensures that International
26 Marketplace will not continue to violate the law, willfully, inadvertently or otherwise. Yedalian
27 Decl. ¶ 26.

Such non-pecuniary benefits are properly considered in judging the results of the lawsuit. *See, e.g., Craft v. County of San Bernardino*, 624 F.Supp.2d 1113, 1121, (C.D. Cal. 2008) (taking into account fact that, in addition to monetary aspects, the defendant stopped the practices at issue). This is especially true with a consumer protection statute such as FACTA which, as the Ninth Circuit has held, serves both a compensatory and "deterrent purpose." *Bateman*, 623 F.3d at 718. "In fashioning FACTA, Congress aimed to 'restrict the amount of information available to identity thieves.'" *Ibid.* The non-pecuniary benefits achieve that substantial purpose.

The importance of such non-pecuniary benefits was also recently explained by the Ninth Circuit in a case involving another consumer protection statute, the Fair Debt Collection Practices Act:

"The FDCPA is a consumer protection statute and was intended to permit, even encourage, attorneys like Lemberg to act as private attorney generals to pursue FDCPA claims. Moreover, plaintiffs have already benefitted and will continue to benefit from this case. Mickell admits that he has ceased his practice of sending letters to debtor's workplaces, a benefit to all class members. Furthermore, certifying the class will serve a 'deterrent' component to other debt collectors who are engaging, or consider engaging in this type of debt collection tactic." *Evon v. Law Offices of Sidney Mickell*, 688 F.3d 1015, 1031 (9th Cir. 2012).

C. Agreement Provides That Change Of Law Before Final Approval of Settlement Will Not Compromise Settlement Class Members' Benefits

A further benefit of the settlement assures that if there is an intervening change of law before final approval of the settlement, the settlement and settlement benefits will continue to remain valid, enforceable and available to Settlement Class members. Agreement ¶ 41.

The significance of this benefit cannot be understated. For example, as explained by the Ninth Circuit in *Bateman*, in 2008 (while many FACTA lawsuits were then pending) Congress enacted the Credit and Debit Card Receipt Clarification Act ("Clarification Act"). The Clarification Act retroactively granted a *temporary* immunity from statutory damages for FACTA violations to those defendants that printed an expiration date "between December 4, 2004, and

June 3, 2008 [the date the Clarification Act was enacted]." *Bateman, supra*, 623 F.3d at 717. As a result of the change of law imposed by the Clarification Act, many FACTA class action cases were dismissed without any recovery for consumers. Yedalian Decl. ¶ 28.

The risks posed by potential changes in the law through judicial opinions likewise cannot be understated, particularly in the dynamic area of statutory damage issues. For example, in a case involving another statute, the Real Estate Settlement Procedures Act of 1974 ("RESPA"), the Ninth Circuit reaffirmed the principle that a violation of statute gives rise to Article III standing, even in the absence of actual monetary damages: "The injury required by Article III can exist solely by virtue of 'statutes creating legal rights, the invasion of which creates standing.'" *Edwards v. First Am. Corp.*, 610 F.3d 514, 517 (9th Cir. 2010). However, the United States Supreme Court granted *certiorari* in the *Edwards* case to consider the Article III standing issue. *First Am. Fin. Corp. v. Edwards*, 131 S.Ct. 3022 (June 20, 2011). The Supreme Court's anticipated decision was expected to have potentially far reaching effects in the area of statutory damage cases. The Supreme Court's grant of *certiorari* caused substantial uncertainty and provided defendants facing statutory damage allegations with a potential defense that the law may change. On the last day of the Supreme Court's term, the Supreme Court dismissed the writ of *certiorari* as improvidently granted. *First Am. Fin. Corp. v. Edwards*, 132 S.Ct. 2536, 2537 (June 28, 2012). Thus, while no change of law occurred as a result of the Supreme Court's actions in *Edwards*, these events likewise demonstrate the potential for changes in law and the real benefits conferred by the settlement which safeguards against any such potential changes. Yedalian Decl. ¶ 29.

Indeed, the issue of statutory damages is once again before the Supreme Court as a result of *certiorari* granted in *Robins v. Spokeo, Inc.*, 742 F.3d 409 (9th Cir. 2014). See *Spokeo, Inc. v. Robins*, 135 S.Ct. 1892 (*certiorari* granted April 27, 2015).

D. The Settlement Is The Product of Extensive Arm's-Length Negotiations

The Agreement is the product of extensive, adversarial, arm's-length discussions, negotiations, correspondence, factual and legal investigation and research, and careful evaluation of the respective parties' strengths and weaknesses. Yedalian Decl. ¶¶ 30-34.

The Agreement was also reached through the extensive negotiations that occurred with the

1 assistance with the mediator, Judge Pro. (Ret.). Yedalian Decl. ¶¶ 5-13. "The assistance of an
 2 experienced mediator in the settlement process confirms that the settlement is non-collusive."
 3 *Satchell v. Fed. Express Corp.*, 2007 WL 1114010 *4 (N.D. Cal. 2007).

4 **E. The Findings Made In This Court's Orders Granting Preliminary Approval**
 5 **Likewise Support The Grant of Final Approval**

6 The findings made in this Court's Orders granting preliminary approval of settlement (Dkt.
 7 #30), are likewise adequate considerations that support the grant of final approval of the
 8 settlement.

9 **F. The Lack Of Any Opt-Outs, Objections And Requests To Appear Also**
 10 **Supports The Grant of Final Approval**

11 The lack of any opt-outs, objections and requests to appear also provides further support
 12 for the Settlement. "It is established that the absence of a large number of objections to a proposed
 13 class action settlement raises a strong presumption that the terms of a proposed class settlement
 14 action are favorable to the class members." *In re Omnivision Techs., Inc.*, 559 F.Supp.2d 1036,
 15 1043 (N.D. Cal. 2008) (quoting *Nat'l Rural Telecomms. Coop. v. DirecTV*, 221 F.R.D. 523, 529
 16 (C.D. Cal. 2004)). "The absence of a single objection to the Proposed Settlement provides further
 17 support for final approval of the Proposed Settlement." *Nat'l Rural Telecomm. Coop.*, 221 F.R.D.
 18 at 529.

19 The lack of any objection from or intervention by the CAFA Coordinators of the 50 states
 20 or U.S. Department of Justice likewise provides further support for the settlement.

21 **XII. CONCLUSION**

22 The proposed class action settlement is fair, adequate and reasonable. It is non-collusive,
 23 and it was achieved as the result of informed, extensive, and arm's-length negotiations conducted
 24 by experienced counsel and with the assistance of mediator, Judge Pro (Ret.).

25 It is respectfully requested that the Court grant final approval of the settlement and enter an
 26 order and judgment in the form proposed and submitted herewith.

1 Plaintiff also respectfully requests that the Court grant Plaintiff's Motion For Award Of
2 Attorneys' Fees And Costs To Class Counsel And Incentive Payment To The Class Representative
3 (set for hearing concurrently with this instant Motion).

4
5 Respectfully submitted,

6
7 DATED: January 8, 2016

CHANT & COMPANY
A Professional Law Corporation

8
9 By: /S/ – Chant Yedalian
10 Chant Yedalian
11 Counsel For Plaintiff and the Settlement Class
12
13
14

15 **CERTIFICATE OF SERVICE**

16 I hereby certify that I electronically filed the foregoing with the Court using the CM/ECF
17 system which will send notification of such filing to the electronic service list for this case.

18
19 Dated: January 8, 2016

CHANT & COMPANY
A Professional Law Corporation

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21 By: /S/ Chant Yedalian
Chant Yedalian
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